119 FERC ¶ 61,194
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

LG&E Energy Marketing Inc. Docket No. ER07-690-000

ORDER ACCEPTING TARIFF AMENDMENT

(Issued May 25, 2007)

1. On March 30, 2007, LG&E Energy Marketing, Inc. (LG&E Marketing) filed a proposed amendment to its Tariff for Cost-Based Sales of Capacity and Energy (Cost-Based Tariff) that would allow LG&E Marketing to make short-term sales of capacity and energy to LG&E Marketing's non-utility affiliates. As discussed below, we will accept the proposed tariff amendment.

Background

2. LG&E Marketing is a power marketer that does not own any generating facilities. It is a wholly-owned subsidiary of E.ON U.S. LLC (E.ON U.S.). E.ON U.S. owns two vertically-integrated public utility subsidiaries – Louisville Gas and Electric Company (LG&E) and Kentucky Utilities Company (KU). LG&E owns and operates electric generation, transmission, and distribution facilities, and also natural gas distribution and storage facilities, in Kentucky. KU owns and operates electric generation, transmission, and distribution facilities in Kentucky, with limited operations in Tennessee and Virginia. LG&E and KU are the only affiliates of LG&E Marketing that have franchised service territories or captive customers.

3. LG&E Marketing's Cost-Based Tariff permits LG&E Marketing to make wholesale sales of energy and capacity at cost-based rates, for terms of less than one year in duration, to unaffiliated customers within the LG&E/KU and the Big Rivers Electric Corporation control areas.[1] The Cost-Based Tariff prohibits LG&E Marketing from selling capacity and energy to any affiliate unless it makes a separate filing under section 205 of the Federal Power Act (FPA).[2]

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[1] *Louisville Gas and Electric Co.*, Docket No. ER06-1438-001 (November 28, 2006) (unpublished letter order).

[2] LG&E Energy Marketing, Inc., FERC Electric Tariff, First Revised Sheet No. 1,

Proposed Amendment to Cost-Based Tariff

4. LG&E Marketing states that the proposed amendment to allow LG&E Marketing to make short-term sales of capacity and energy to its non-utility affiliates is consistent with Commission policy and precedent. LG&E Marketing states that the proposed amendment would not raise any affiliate abuse concerns because the amendment would not permit cost-based sales to LG&E or KU, the only affiliates of LG&E Marketing with franchised service territories or captive customers. LG&E Marketing argues that the Commission has granted authority for affiliate sales at market-based rates where there are no captive customers.[3]

5. LG&E Marketing states that when it filed its Cost-Based Tariff, it did not envision the need or desire to have the flexibility to make short-term sales to its non-utility affiliates.[4] LG&E Marketing further states that it has recently determined that it would like such flexibility in the future to make short-term cost-based sales.

6. LG&E Marketing requests waiver of the Commission's 60-day prior notice requirement to permit the amended Cost-Based Tariff to become effective on April 1, 2007.

Superseding Sub. Original Sheet No. 1.

[3] *Electric Energy, Inc.*, 113 FERC ¶ 61,245 (2005).

[4] LG&E Marketing states that it currently has the ability to make affiliate sales to non-utility affiliates under its market-based rate tariff.

Notice of the Filing and Responsive Pleadings

7. Notice of LG&E Marketing's filing was published in the *Federal Register*, 72 *Fed. Reg.* 17,548 (2007), with interventions and protests due on or before April 20, 2007. Bluegrass Generation Company, L.L.C. (Bluegrass) and Dynegy Power Marketing, Inc. (Dynegy Power Marketing) (together, Dynegy) filed a timely motion to intervene and protest on April 20, 2007.[5] Dynegy filed a motion to file additional comments and an erratum on April 23, 2007. On May 4, 2007, LG&E Marketing filed a motion for leave to answer and answer to the Dynegy's motion to intervene and comments.

Discussion

A. Procedural Matters

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motion to intervene serves to make the entity that filed it a party to this proceeding. We will grant Dynegy's motion to file additional comments and erratum given the early stage of the proceedings, the party's interest and the absence of prejudice or delay.

9. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2)(2006), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept LG&E Marketing's answer to Dynegy's comments, as it provided information that assisted us in our decision-making process.

B. Dynegy Protest

10. In its protest, Dynegy acknowledges that LG&E Marketing has been able to make short-term sales to non-utility affiliates under its market-based rate tariff. Dynegy contends, however, that these affiliate sales are permissible only if they are made in accordance with certain restrictions incorporated in LG&E Marketing's market-based rate tariff. Without addition of similar restrictions to its Cost-Based Tariff, Dynegy expresses concern that LG&E Marketing's proposed revisions could lead to undue preference to affiliates and cause harm to the wholesale competitive market.

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[5] Bluegrass and Dynegy Power Marketing are subsidiaries of Dynegy Inc. Bluegrass operates a natural gas-fired peaking generating facility located in Oldham Kentucky, which is interconnected with the transmission system of LG&E. Dynegy Power Marketing is a marketer of wholesale electric power with market-based rate authority.

11. Dynegy notes that LG&E Marketing's market-based rate tariff precludes LG&E Marketing from conspiring or colluding with a third party for purposes of reselling power in a transaction that LG&E Marketing would be precluded from making directly. Dynegy suggests that if the Commission accepts the proposed amendment, it should direct LG&E Marketing to incorporate similar anti-collusion restrictions in its cost-based tariff.

12. Dynegy also argues that LG&E Marketing's Cost-Based Tariff should include additional language requiring that affiliate sales of one year or longer be filed with the Commission. Dynegy notes that under the existing Cost-Based Tariff, LG&E Marketing can make short-term sales to unaffiliated entities but sales of a longer duration must be filed with the Commission. Dynegy points out that LG&E Marketing has not included any such exception in the revised tariff language permitting affiliate sales of less than one year. Dynegy contends that in the absence of a restriction prohibiting LG&E Marketing from entering into multiple contracts of less than one year with the same counterparty via the anti-collusion provision, LG&E Marketing should be restricted from entering into multiple year contracts that would circumvent this prohibition.

13. Finally, Dynegy suggests that if the Commission accepts LG&E Marketing's proposed revision to allow cost-based sales to non-utility affiliates, the Commission should strike the "availability" provision included in the Cost-Based Tariff, which provides that "[t]he determination of whether to enter into agreements under this Tariff shall be made at [LG&E Marketing's] sole discretion." Dynegy argues that if LG&E Marketing is willing to sell at cost, then it should be indifferent to whom it sells and should not be permitted to unduly discriminate between its affiliates and others.

C. <u>Answer of LG&E Marketing</u>

14. LG&E Marketing argues that Dynegy's proposed restrictions are misinformed and misplaced and, therefore, should be rejected in their entirety. LG&E Marketing contends that Dynegy's proposed restrictions amount to nothing more than an attempt to obtain a competitive advantage over another marketer and engage in what effectively amounts to price arbitrage. Accordingly, LG&E Marketing asks the Commission to reject Dynegy's proposals in full. If, however, the Commission does not accept the proposed tariff amendment in full and without hearing, LG&E Marketing asks the Commission to allow it to withdraw its filing and terminate the proceeding.

15. LG&E Marketing argues that Dynegy's proposal to include anti-collusion language drawn from LG&E Marketing's market-based rate tariff is inappropriate. LG&E Marketing points out that its market-based rate tariff includes anti-collusion language because LG&E Marketing's market-based rate authority is limited in some control areas but not others. LG&E Marketing contends, however, that the anti-collusion provision is not relevant to the Cost-Based Tariff because LG&E Marketing's cost-based

sales authority need not be geographically mitigated, as cost-based sales do not present issues of potential abuse of market power.

16. LG&E Marketing also asserts that Dynegy's proposal to include language requiring that sales to its non-utility affiliates of one year or longer be filed with the Commission is redundant and would add confusion. LG&E Marketing states that the Cost-Based Tariff is by its terms limited to sales of less than one year, meaning that, by definition, longer agreements must be filed with the Commission. LG&E Marketing further points out that Paragraph 2 of the Cost-Based Tariff already states that agreements of one year or longer must be filed with the Commission.

17. In response to Dynegy's request that LG&E Marketing delete the provision regarding LG&E Marketing's discretion to make sales under the Cost-Based Tariff, LG&E Marketing asserts that the provision simply reflects the fact that the FPA does not impose any "must offer" requirement. According to LG&E Marketing, the only restriction on its discretion to make sales under the Cost-Based Tariff is that it cannot act in an unduly discriminatory manner under FPA section 205. LG&E Marketing therefore contends that the tariff language is entirely consistent with the FPA and need not be removed from the tariff.

D. Commission Determination

18. We will accept LG&E Marketing's proposed amendment to its Cost-Based Tariff. Our review indicates that the proposed amendment appears to be just and reasonable and has not been shown to be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. Accordingly, we accept the proposed amendment in its entirety and without requiring any of the revisions proposed by Dynegy, as discussed below.

19. We disagree with Dynegy's assertion that the proposed revisions could lead to undue preference. As an initial matter, LG&E Marketing proposes to sell to non-utility affiliates under its previously accepted Cost-Based Tariff. The proposed revisions to the Cost-Based Tariff would allow sales only to affiliates other than LG&E and KU, LG&E Marketing's only affiliates with franchised retail service territories or captive wholesale power sale customers served at cost-based rates. Because no captive customers are involved, there is no potential for affiliate abuse. We therefore reject Dynegy's argument.

20. We also will not require LG&E Marketing to include the anti-collusion language proposed by Dynegy. As noted by LG&E Marketing, this language was proposed in a market-based rate proceeding to address specific issues raised in that proceeding.[6] As

[6] The proposed language is drawn from LG&E Marketing's market-based rate

those issues are not presented here, we find Dynegy's proposal to be inappropriate and therefore we will reject it.

21. Similarly, we find Dynegy's request for additional language requiring that all cost-based affiliate sales of one year or longer be filed with the Commission to be unwarranted. LG&E Marketing's Cost-Based Tariff already includes language requiring the company to file with the Commission any sale of one year or longer in duration.[7] Moreover, we note that the Commission and other interested parties can identify transactions that may circumvent the filing requirement for long-term sales through monitoring and review of the Electric Quarterly Reports required filed with the Commission. If the Commission finds evidence of such activity, it will take appropriate action as necessary. If Dynegy has reason to believe that LG&E Marketing is circumventing the filing obligation for long-term sales by engaging in successive short-term sales, Dynegy may file a complaint with the Commission under FPA section 206.

22. Finally, we deny Dynegy's proposal to strike the "availability" provision included in the Cost-Based Tariff, which provides that "[t]he determination of whether to enter into agreements under this Tariff shall be made at [LG&E Marketing's] sole discretion." We agree with LG&E Marketing that it is prohibited under FPA section 205 from acting in an unduly discriminatory manner. Therefore, we find that it is unnecessary to require LG&E to remove the "availability" provision from its Cost-Based Tariff.

E. Effective Date

23. We find good cause exists to grant LG&E Marketing's request that the Commission waive its 60-day notice requirement under the Commission's regulations and make the proposed amendment effective as of April 1, 2007.[8]

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tariff that was accepted for filing under delegated authority to address market power concerns raised in that proceeding. *See LG&E Energy Marketing, Inc.*, Docket No. ER06-1046-000 (July 6, 2006) (unpublished letter order), as corrected by an erratum (August 10, 2006).

[7] LG&E Energy Marketing, Inc., FERC Electric Tariff, First Revised Sheet No. 1, Superseding Sub. Original Sheet No. 1 at P 2.

[8] *See Central Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106 at 61,338, *reh'g denied*, 61 FERC ¶ 61,089 (1992) (finding that the Commission will grant waiver of notice requirements for changes in rates, terms and conditions for existing service where the filing is made within a "reasonable time").

<u>The Commission orders:</u>

(A) LG&E Marketing's proposed amendment to its Cost-Based Tariff is hereby accepted for filing, effective April 1, 2007, as discussed in the body of this order.

By the Commission.

Kimberly D. Bose,
Secretary.